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ORIGINAL

NO. 96-8334

(3)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK DEWAYNE BETHLEY
PETITIONER

VERSUS

STATE OF LOUISIANA
RESPONDENT

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF CERTIORARI

ORIGINAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA

A CAPITAL CASE

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STATEMENT OF JURISDICTION

Jurisdiction in this matter is controlled by 28 U.S.C. 1257. Pursuant to that statute, the finality of the state judgment for review by the United States Supreme Court is normally defined by imposition of sentence. Flynt v. Ohio, 451 U.S. 619, 101 S.Ct. 1958 (U.S. Ohio 1981). The instant case has not proceeded to trial and sentence has not been imposed. The decision of the Supreme Court of Louisiana finding the death penalty constitutional for the crime of rape of a child less than twelve is not within the jurisdiction of this Honorable Court. The defendant has an adequate remedy by way of appeal of any adverse judgment to the appropriate courts.

QUESTION PRESENTED FOR REVIEW

Can the State of Louisiana seek the death penalty for an AIDS inflicted child rapist?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions. The Eighth Amendment to the Constitution of the United States, which provides in pertinent part:

"Excessive bail shall not be required..nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

LSA-R.S. 14:42, which provides in pertinent part:

> "A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed...
>
> *******
>
> (4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense
>
> ******
>
> C. ..[I]f the victim was under the age of twelve years, as provided by Paragraph A(4) of this section, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence, in accordance with the determination of the jury."

STATEMENT OF THE CASE

The defendant, Patrick DeWayne Bethley, DOB 2/9/68, has been indicted in a three count indictment for aggravated rape of three minor children, all under the age of 12: A.K. DOB 12/5/90; F.K. DOB 3/9/88 and L.K. DOB 11/29/86. The offenses are alleged to have occurred between December 1, 1995 and January 10, 1996. On April 15, 1996, the State announced that it would seek the death penalty in this case pursuant to R.S. 14:42(C) as amended in legislative session .

On April 30, 1996, the defendant filed a "Motion to Strike and Quash as Unconstitutional the Louisiana Statute providing for the Imposition of the Death Penalty in Cases of Aggravated Rape in which the victim is under the age of twelve years."

On May 29, 1996, the motion was heard by the Honorable John R. Harrison, Fourth Judicial District Court and taken under advisement.

On June 7, 1996, the trial court granted the defendant's Motion to Quash, finding the death penalty unconstitutional as it relates to aggravated rape when the victim is under the age of 12. The Court found that R.S. 14:42, as amended, would "pass muster under the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and Article 1, Section 20 of the Louisiana Constitution" if the class of death-eligible defendants was not limited under LSA-R.S. 14:42 and C.Cr.P. Art. 905 et.seq.

On June, 11, 1996, the State gave notice of its intent to appeal the ruling and was given until July 26, 1996. The State requested an extension and was given until August 5, 1996 to submit its brief. On December 13, 1996, the Louisiana Supreme Court upheld the constitutionality of La. R.S. 14:42(C). The defendant applied for rehearing which was

denied.

The defendant now applies for writ of certiorari with this Honorable Court.

SUMMARY OF THE ARGUMENT

Legislative enactments are presumed constitutional under both the Federal and State Constitution. Gregg v. Georgia, infra; State v. Griffin, 495 So.2d 1306 (La. 1986). The decision by the Supreme Court of Louisiana finding the death penalty constitutional for the crime of rape of a child less than twelve is not within the jurisdiction of this Court. In context of criminal prosecution, the finality of state court judgment for purposes of review by the United States Supreme Court, is normally defined by the imposition of sentence. Flynt v. Ohio, 101 S.Ct. 1958, 451 U.S. 619 (U.S. Ohio 1981). This case has not proceeded to trial and sentence has not been imposed. The defendant has an adequate remedy by way of appeal of any adverse judgment to the appropriate court.

Evolving needs of society mandate the protection of our children especially in a society with sexually transmitted diseases such as AIDS that can lead to death much quicker and with more certainty than any decision by a jury. Accordingly this writ of certiorari should be denied.

ARGUMENT

The case before the Court is that of State of Louisiana v. Patrick Bethley, No. 96-8334 whom the state alleges raped three young girls all under the age of twelve and further it is alleged that at the time the rapes occurred Patrick Bethley knew that he had Aquired

Immune Deficiency Syndrome commonly referred to as AIDS. One of the girls was the natural child of Bethley.

The people of Louisiana have determined through their legislature that the death penalty for the rape of a child under twelve is necessary for the protection of their children and to provide for a stable community. This Court has acknowleged that child abuse can have a devastating effect on a child to the extent that where a defendant in a capital murder case has been the subject of abuse, the jury must be allowed to cnsider that as a mitigating circumstance. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Applicant asserts that the death penalty for the rape of a child under the age of twelve violates both the Eighth Amendment and the Fourteenth Amendment to the United States Constitution.

I. Eighth Amendment Challenge

The Eighth Amendment prohibits punishment that is cruel and unusual. U.S.C.A. Const. Amendment 8; Furman v. Georgia, 409 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). A punishment is cruel and ubusual if it is administered in an arbitrary and capricious manner or if it is excessive. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

A punishment is administered in an arbitrary and capricious manner if it is imposed in a discretionary manner. A jury cannot be given "unbridled discretion" but must be guided by law. Gregg, supra.

A punishment is excessive if it makes no measurable contribution to acceptable

goals of punishment and is, therfore, nothing more than unnecessary and wanton infliction of pain or if it is grossly out of proportion to the severity of the crime.

a. Death As A Penalty For The Rape Of A Child Less Than Twelve Years Is Not Excessive

Death is an excessive penalty when it is contrary to "contemporary values." Punishment for a crime must reflect "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958), Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). The Eighth Amendment is not a "static concept". Gregg , supra. Society does change and what is considered appropriate measures to protect society change.

This Court has held that the actions of legislatures and juries are to be considered as objective criteria in determing whether a sentence is disproportionate. Gregg, supra; Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Penry , supra . However, these cannot be dispositive in all cases. If this were true, then the Eighth Amendment would be a "static concept" in that legislatures could not respond with new and necessary measures to protect society as it changes.

1. Legislative Enactments And Actions of Sentencing Juries

Applicant makes much of the fact that Louisiana is the only state in over twenty years that has authorized the death penalty for the rape of a child under twelve. This fact must be viewed in light of the development of capital punishment since the time of Furman and Coker coupled with the needs of society today.

The state of capital punishment after the Furman decision holding that the death penalty could not imposed in a discretionary manner has been somewhat uncertain. Following right on the heels of Furman the Court in Coker held that the death penalty for rape of an adult woman was unconstitutional. Certainly states have been hestitant to impose the death penalty for any crime other than murder. However, much has changed since the time of Furman and Coker. Today we have AIDS, a sexually transmitted disease that is ultimately deadly. We have to teach children the difference between a "good touch" and a "bad touch" so that they may better protect themselves. Parents don't let their children walk a few blocks to the park for fear that someone will pick them up. The death penalty for the rape of a child under twelve is necessary to cope with these changes in our society and to provide for the protection of our children.

In evaluating the actions of legislatures and juries, this Court has done so in light of the culpability of the offender. Where a defendant participated in a robbery but did not kill, intend to kill, or intend that a killing take place, his culpability was not such that the death penalty was permissible. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) . Where a defendant is under the age of sixteen, he is not as culpable as an adult due to his youth and inexperience and therefore the death penalty is not permissible. Thompson, supra. On the other hand, when a person is a major actor in a felony and knows that death is likely to occur and a death occurs, the death penalty is appropriate. Tison v. Arizona, 481 U.S. 135, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). The execution of the mentally retarded was held by this Court to be Constitutional. There are different levels of mental retardation and it is difficult to asses to what degree a person is retarded and how the retardation affects their propensity to commit crimes. Additionally,

in many cases such as was the case in Penry, the mentally retarded will not be able to learn that his behavior is not appropriate increasing the danger to society of repeated criminal activity. Penry, supra.

As this Court has done in Tison, supra; Enmund, supra; Thompson , supra and other cases when evaluating legislative action, the culpability of the offender must be evaluated. The person that rapes a child less than twelve seeks out that child for his own satisfaction. A child less than twelve is pre-pubescent and will not have the characteristics of development that a child just as few years older has. Pubic hair and genitilia development is not appreciable The offender knows he is having sex with a **child**. The damage a child suffers from sexual molestation is **inherent in the crime**. Brown ,supra. There is no question that the child victim will suffer damage of some kind. The rapist in having sexual intercourse with a child intends that these consequences occur. Additionally, the offender knows that the young child is not capable of protecting himself or herself and indeed the child may not realize what is about to happen to them. Applicant asserts that there is no mental element in the crime of rape of a child. While it is true that there is no "specific intent" requirement in the crime, pratically speaking, the child rapist for reasons stated above seeks out and knows he is having sexual intercourse with a child and has no regard as to the affects his actions have on that child and the community as a whole.

The case before the Court in Coker involved a woman that had been raped but there was no "serious" physical to the victim. The Court noted that "rape by definition does not include the death of or even the serious injury to another person." Coker at 2869. The Court addressed the constitutionality of the death penalty in light of the crime and its affect

on the victim. The Court specifically limited it's holding to the rape of an adult woman and left open the question of rape of a child. Certainly, it cannot be said that the rape of a child less than twelve does not result in permanent injury of some kind, physical, psychological or both. Rape of a child less than twelve cannot be compared to rape of an adult. A child has just begun to live and the things thast happens to that child in its early years affects how he or she will function.

> "Common experience tells us that there is a Vast difference in mental and physical maturity of an Adolescent teenager...and a pre-adolescent child...It Is well known that child abuse leaves scars from one Generation to the next...such injury is inherent In the offense." State v. Brown, 660 So.2d. 123 (La. App. 2d Cir. 1995).
>
> "....Aggravated rape inflicts mental and psychological Damage to its victims and undermines the community Sense of security. The physical trauma and indignities Suffered by the young victim of this offense were Of enormous magnitude...."State v. Polkey, 529 So.2d 474 (La. App. 1 Cir. 1988).
>
> "...the child's tender age made her particularly vulnerable and incapable of resisting....considering acutely deleterious consequences of conduct on an eight-year old child." State v. Jackson, 658 So.2d 722 (La. App. 2d Cir. 1995).
>
> "....and because of his history of childhood abuse That same juror could also conclude that penry was Less morally "culpable than defendant's who have no such excuse. But who acted 'deliberately' as that term is commonly understood." Penry , supra.

The statistics available today (see defendant's brief at pages 18-20) reflecting legislative enactments regarding the rape of a child less than twelve do not support that

the death penalty is unacceptable for the crime in every instance. In fact, the statistical data is inconclusive. This Court should note the trend in legislative enactments directed toward protecting children. Laws have been passed requiring sex offenders to register across state lines, the Protection Against Sexual Exploitation Act was passed to protect children from exploitation. Recently, this Court addressed the Kansas Sexual Violent Predator Act in State of Kansas v. Hendricks, No. 95-1649. Children are a class of persons that need protection. State v. Brown supra;Morisette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed.2d. 288 (1952).

> "....the defendant promised the victim (a seven year year old girl) candy if she would lower her pants and underwear . After doing as he requested, she stated that The defendant placed her on the bed, removed his clothes and attempted to have sexual intercourse with her. State v. Feet, 481 So.2d 667 (La. App. 1 Cir. 1985).

The statistics available today (see defendant's brief at pages 26 and27) regarding the actions of sentencing juries likewise do not support that the death penalty is unacceptable for the crime of rape of a child. In Coker, the review of actions of sentencing juries was relative to rape of an adult woman and not a child. Most of the statistics referred to by applicant refer to pre-Furman cases with the emphasis on racial issues. Statistics since Furman are of course scarce. Even after Furman Florida, Mississippi and Tennesse had statutes providing for the death penalty for the rape of a child. However, the Florida statutes, F.S. 775.082(1) and F.S. 794.011(2), were deemed unconstitutional by the Florida Supreme Court in that court erroneously determined that Coker applied. Buford v.

State, 403 So 2d 943 The Mississippi statute, M.C.A. Section 99-3-65, was invalidated in that the Mississippi statutory scheme did not provide for the death penalty where there was not a killing. The Mississippi court did not, however, address the issue of whether the death penalty for rape of a child was constitutional. Leatherwood v. State, 548 So.2d 389 (Miss. 1989). The Tennesse statute was invalidated because the death penalty was mandatory. Collins v. State, 550 S.W.2d 643 (Tenn. 1977). Given that three other states attempted in the post-Furman aftermath to impose the death penalty for the rape of a child does support the proposition that Louisiana is not the only state recognizing the need for such a punishment. This Court should consider this in light of the trend seen in laws enacted by legislation for the protection of children. The enactment of these laws through the years reflects society's increasing need to provide for protection of its children.

The actions of legislatures and juries are not dispositive on the question of whether the death as a penalty for the rape of a child under twelve is excessive. Society has an increasing need to protect its children in light of AIDS and other developments since Furman. The Eighth Amendment is not a static concept but must conform to contemporary values. Living in New Orleans, Louisiana is very different than living in a quiet Midwest town. The Louisiana legislature in providing for the death penalty for the crime of rape of a child has conformed to contemporary values by providing for society's need to protect its children.

II. CAPITAL PUNISHMENT MAKES MEASURABLE CONTRIBUTIONS TO ACCEPTABLE GOALS OF PUNISHMENT

A punishment is excessive if it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Coker, supra. Retribution and deterrance are two legitimate social purposes behind punishment.

> "She took her daughter to the bathroom and discovered that the child had been sexually abused, awakened her husband, informed him that the child had been raped and obtained a pistol from the closet." Upshaw v. State, 350 So.2d 1358 (Miss. 1977).
>
> "In part, capital punishment is an expression of society's moral outrage at a particularly offensive conduct...it is essential in an ordered society that asks its citizens to rely on the legal processes rather than self-help to vindicate their wrongs." Gregg, supra.

Our society does not permit self-help. The need for retribution is addressed in our criminal sanctions. Therefore, to have an ordered society and promote a stable community, our legislature must provide for retribution through criminal sanctions. Gregg, supra. Nowhere is the need for retribution as strong as when the victim is a child. The actions of the mother in Upshaw supra are indicative of that need.

This Court has held that the punishment of a crime should be directly related to the personal culpability of the defendant. California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). Applicant asserts that the death penalty for the rape of a child is a strict liability crime and therefore the defendant cannot be culpable. Again, as noted above, a person that rapes a child of eleven years or less knows that he is raping a child

due to that child's physical characteristics and mannerisms. The rapist knows that this child cannot protect himself or herself. One that knowingly rapes an innocent and unprotected child and subjects that child to present and futrue physical and psychological trauma is certainly culpable and responsible for his actions.

III. The Founding Fathers Allowed For The Death Penalty For The Rape Of A Child Under Ten Years Of Age And Not Twelve

Punishment for a crime is excessive if at the time the Bill of Rights was adopted the punishment would have bneen considered cruel and unusual punishment. Stanford v. Kentucky, 106 L.Ed.2d 306 (1989).

At the time the Bill of Rights was adopted capital punishment was recognized for the rape of a child ten years old or less. Blackstone's Commentaries on the Law. It is apparent from this that the crime of rape of a child has aslways been seen as a reprehensible act deserving of severe punishment. The fact that the legislature today acknowledges the rape of an eleven year old as well is of no moment. The statute still contemplates an innocent pre-pubescent child in need of protection.

The death penalty for the rape of a child is a deterrence to the commission of the crime. When a person is sentenced to life, no one hears about it. However, when a person is sentenced to death, it hits the news and the message is out that you do not harm children. Applicant asserts that the death penalty for raping a child will retard reporting of the crime by families. The state asserts that a family where a child is a victim of sexual abuse will no more report the crime when the sentence is life in prison than they will where the punishment is death. The reasons for not reporting are there in either case

whether financial, fear or love and affection.

IV. Protections For The Accused On Both The Federal And State Level Provide That The Death Penalty For The Rape Of A Child Less Than Twelve Will Not Be Imposed In An Arbitrary And Capricious Manner

Louisiana legislation and the jurisprudence developed in both federal and state arenas provide protections for the accused against an arbitrary and capricious imposition of the death penalty.

The constitutionality of death as a punishment was first addressed in Furman,supra. Prior to that time, the punishment of death had been addressed only as to whether the manner in which it was inflicted was barbaric and not whether the punishment itself was unconstitutional. The Furman Court found the death penalty in the cases before it to be unconstitutional in that the penalty was determined in an arbitrary and capricious manner as it was applied in a discretionary manner. Reflecting on the reason for the enactment of the Eighth Amendment, the Court cited the oppressive manner in which the death penalty had been used historically by those in power to attempt to keep in check those that opposed them. Extrapolating that reasoning to the cases before it, the Court found the same type of potential for such discrimination. The judge or jury had "unbridled discretion" in deciding life or death. There was no guidance from legislation as to what the society they represent considered to be the most heinous of criminal conduct requiring the death penalty. The Court noted also that the rich or favored had access to the best legal help while the poor or less favored were represented by someone who may have had no experience representing defendants alleged to have committed serious offenses much less

those involving the death penalty.

The holding in Furman, finding the death penalty in the cases before it to be unconstitutional, was based on the discretionary manner in which the penalty was decided. The court did not hold the death penalty in and of itself to be unconstitutional. Furman, supra; Gregg, supra.

In 1976, the Court again addressed capital punishment. In response to the questions raised in Furman, Georgia enacted legislation requiring a bifurcated proceeding in capital cases whereby a separate hearing was held for the jury to hear additional evidence and argument in deciding whether the death penalty should be imposed. The jury was presented with aggravating and mitigating circumstances regarding the defendant and the crime. The Georgia Supreme Court reviewed every sentence to determine whether it was disproportionate to the sentence usually imposed in similar cases. With these protections against arbitrary and capricious imposition of the death penalty, the Court held that the death penalty does not invariably violate the constitution.

> "The concerns expressed in Furman...can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding..."

In 1977, the Court in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), found the death penalty for the rape of an adult woman to be unconstitutional. The fact that the Court specifically left open the question of the constitutionality of the death penalty for rape of a child supports the fact that there is a vast difference in the effects a rape has on the child victim and society as compared to the rape of an adult victim. Indeed, since 1977, our recognition and knowledge regarding child sexual abuse has

greatly increased. It is now time to address this issue.

Much has changed since the decision in Furman and Gregg. Louisiana law now requires a bifurcated proceeding in capital cases as was approved in the Gregg court. LSA-C.Cr.P. Art. 905 et.seq. The jury is presented both aggravating and mitigating circumstances regarding the defendant and the crime. Juries no longer have "unbridled discretion" in imposing the death penalty. The aggravating and mitigating circumstances and the manner in which the sentencing is to be carried out as provided in Art. 905 et.seq. satisfy constitutionality requirements. The jury must find at least one aggravating factor of those provided by law. LSA-C.Cr.P. Art. 905.3. The defendant may offer any relevant mitigating circumstance.

C.Cr.P. Art. 905 et.seq., providing for a bifurcated proceeding whereby the jury is provided aggravating and mitigating factors to be considered in the penalty phase of trial complies with the requirement in Gregg that the class of death eligible defendants be limited. Article 905 lists twelve aggravating circumstances to be considered in the penalty phase. Of these at least seven of them could apply in a case involving the rape of a child. C.Cr.P. Art. 905.4 is as follows:

> 1. The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, or simple robbery.
>
> 2. The victim was a fireman or peace officer engaged in his lawful duties.
>
> 3. The offender has been previously convicted of an unrelated murder,

aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

4. The offender knowingly created a risk of death or great bodily harm to more than one person.

5. The offender offered or has been offered or has given or received anything of value for the commission of the offense.

6. The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.

7. The offense was committed in an especially heinous, atrocious or cruel manner.

8. The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

9. The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

10. The victim was under the age of twelve years or sixty-five years of age or older.

11. The offender was engaged in the distribution, exchange, sale or purchase,

or any attempt thereof, of a controlled dangerous substance listed in Schedule I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

12. The offender was engaged in the activities prohibited by R.S. 14:107.1(C)(1):

> "No person shall commit ritualistic mutilation, dismemberment, or torture of a human as part of a ceremony, rite, initiation, observance, performance, or practice."

Noting aggravating circumstance number 10 would include every defendant found guilty of aggravated rape, the Court should find that this does not per se invalidate the statute. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). The Lowenfield court determined that a death eligible class may be narrowed in two ways. The legislature may broadly define a capital offense and require jury findings through aggravating circumstances whereby the narrowing is accomplished at the punishment phase. Alternatively, the legislature may define the capital offense so that the jury finding at the guilt phase accomplishes the required narrowing. The fact that an aggravating circumstance addressed at the punishment phase is also an element of the crime does not negate the narrowing function. The statute must be clear as to what constitutes the criminal activity. State v. David, 468 So.2d 1126 (La. 1984). In both instances, the jury must consider any relevant mitigating circumstance concerning the defendant and the offense. California, supra.

While some of the above listed circumstances may not be applicable to a case involving the rape of a child, a jury is given sufficient guidance as to what our society considers to be heinous circumstances regarding the commission of a crime. That is

where circumstances anticipate violence (1,4,7), the defendant's actions demonstrate an exaggerated disregard for life (4,5,7, 10, 11, 12), where circumstances anticipate interference with the carrying out of law an order (2,8,9), or where the defendant's criminal record demonstrates his propensity for crime and disregard for the rules of society (3,6). Certainly as the law regarding capital punishment for rape of a child less than twelve years develops through legislatures and jurisprudence there may be circumstances **added** to the list that are applicable to the rape of a child less than twelve. However, as the law is today, there is more than adequate guidance through La. R.S. 14:42 and La. C.Cr.P. Art. 905 et.seq. to allow the jury to limit the class of death eligible defendants.

A defendant has other protections against the arbitrary and capricious application of the death penalty. Appeal is available with mandatory review. The Louisiana Supreme Court must review capital cases for excessiveness. La.C.Cr.P. Art. 905.9. (See infra for discussion.)

Today we have an Indigent Defender Board (IDB) from which counsel can be appointed to represent a defendant. An IDB attorney representing a defendant in a capital case must be "death-certified". La. Supreme Court Rule XXXI; State v. Feltus Taylor, WL 83866, 93-2201 (La. 1996). Counsel for defendant involved in the case must have adequate experience to effectively represent a defendant facing the death penalty. Defendants have access to funds to assist in obtaining necessary resources to develop their defense. La. R.S. 15:150 provides for the establishment of regional death penalty centers whereby grants may be applied for and funds used by the center in the defense, appeals and other functions related to capital cases. These centers provide a means to follow development and application of the death penalty to assure that the protections as

provided by law are adhered to and that the laws continue to reflect the needs of society.

Certainly since Furman there has been case law developed on both federal and state levels to provide for protection at the trial level. The availability of challenges to jury selection as provided in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and progeny guard against discrimination based on race, gender, etc.

Guidance for juries provided in Art. 905 et.seq., development of requirements for adequate representation of the accused and protections developed through the courts guard against arbitrary and capricious imposition of the death penalty of the rape of a child less than twelve years.

CONCLUSION

Respondent accordingly requests that Petiitioner's request for writ of certiorari be denied.

Respectfully submitted:

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STATE OF LOUISIANA

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BY: _____
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CERTIFICATE

IT IS HEREBY CERTIFIED that a copy of the foregoing brief was mailed, postage prepaid, to Mr. John Holdridge, Attorney for Defendant, 636 Baronne Street, New Orleans, LA 70113.

MONROE, LOUISIANA, on this 23rd day of April, 1997.

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April 23, 1997

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. William Suter
Clerk of Court
Supreme Court of United States
301 Loyola Avenue
New Orleans, LA 70112

Re: Patrick Bethley v.
Louisiana
No. 96-8334

Dear Mr. Suter:

Please find attached the original and ten (10) copies of the Respondent's brief for filing in the above referenced case.

Your cooperation is greatly appreciated.

Sincerely,

Jerry L. Jones
District Attorney

JLJ: afj

cc: Mr. John Holdridge
Attorney for Petitioner

SUPREME COURT OF THE UNITED STATES

PATRICK DEWAYNE BETHLEY *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 96–8334. Decided June 2, 1997

The petition for a writ of certiorari is denied.

Statement by JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, respecting the denial of the petition for writ of certiorari.

It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought. *United States* v. *Carver*, 260 U. S. 482, 490 (1923). See *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (opinion of STEVENS, J., respecting the denial of certiorari); *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (opinion of Frankfurter, J., respecting the denial of certiorari). That is certainly true of our decision to deny certiorari in this case. It is worth noting the existence of an arguable jurisdictional bar to our review. Our consideration of state-court decisions is confined to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U. S. C. §1257(a). Petitioner has been neither convicted of nor sentenced for any crime. As we have indicated, "in the context of a criminal prosecution, finality is normally defined by the imposition of the sentence." *Flynt* v. *Ohio*, 451 U. S. 619, 620 (1981). See *Baltimore Radio*, 338 U. S., at 918 (noting one reason for denial of certiorari is that "judgment of the lower court may not be final").